trafficking with a confederate and so far as the accused is concerned, the charge of trafficking has been made out against him.

I find him guilty. And I convict him.

Order accordingly.

Solicitors: *Fernandez & Co.*

Reported by *Wong Kim Fatt*

Pamaron Holdings Sdn Bhd v Ganda Holdings Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C22-174-86
VC GEORGE J
13 FEBRUARY 1988

Companies and Corporations – Sale of shares – Contract for – Breach by buyer – Summary judgment sought by seller – Objections by buyer – Whether buyer can plead that sale was ultra vires – Whether compliance with s 132C(i) of Companies Act 1965 needs to be pleaded by seller – Companies Act 1965, ss 20 & 132C(i)

Contract – Sale of shares – Breach of contract – Whether such contract is enforceable by specific performance – Whether sale was entered into under duress and pressure

The plaintiff and the defendant entered into a written agreement for the sale and purchase of shares in a private limited company. The defendant defaulted in the payment of the purchase price and the plaintiff applied for summary judgment against it. In opposing the application, the defendant contended that: (a) the plaintiff had corrected its statement of claim by way of affidavits and this is not allowed; (b) it had entered into the agreement under duress and pressure; (c) s 132 C (i) of the Companies Act 1965 was not complied with by the plaintiff; (d) the transaction was ultra vires the plaintiff company; (e) for specific performance, there should not only be good consideration but also valuable consideration; and (f) a contract for the sale of shares is not a proper subject for specific performance.

Held, allowing the application:

(1) There were no defects or omissions in the statement of claim, and the affidavits filed by the plaintiff do not seek to supplement or amend or correct the statement of claim.

(2) The exact acts of duress and pressure and who were subjected to them and what the acts of concealment and deception were were not divulged. In any event, the fact that the alleged duress and pressure were said to have been applied prior to the agreements entered into and the agreements were subsequently completed without any protest does not show that the duress and pressure defence was made bona fide and it is so lacking in merit that it can be said to be frivolous and vexatious.

(3) It is ridiculous to suggest that every time a company sues on a contract, it has in its statement of claim vis-à-vis the contract to plead more than the fact that it had entered into the contract on which the suit is based.

(4) Section 20 of the Companies Act 1965 provides that an outsider, other than a debenture holder or the minister, may not raise ultra vires. The defendant is an outsider and not a debenture holder or the minister.

(5) There is no rule that for specific performance, good consideration is not good enough and that there should be valuable consideration. In any event, it would be most inequitable and unconscionable to allow the defendant at this stage, having agreed that each of the parties should go its separate way, to seek the aid of equity to avoid its legal obligations.

(6) The authorities show that a seller of shares not freely saleable in the open market is entitled to specific performance. As such, the present contract for the sale of shares is enforceable by specific performance.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 207 of 1988.]

Cases referred to

1 *Duncuft* v *Albrecht* 59 ER 1104 (refd)
2 *Gan Realty Sdn Bhd* v *Nicholas & Ors* [1969] 2 MLJ 110 (refd)
3 *Turner* v *Bladin* (1950-51) 82 CLR 463 (refd)
4 *Odessa Tramways Co* v *Mendel* (1878) 8 Ch D 235 (refd)

Legislation referred to

Companies Act 1965 ss 20, 132C(i)

Jennifer Cheong (*Miss*) for the plaintiff.
MS Murthi for the defendant.

Cur Adv Vult

VC George J: It is common ground that the plaintiff and the defendant entered into a written agreement dated 1 February 1986 by which the plaintiff agreed to sell and the defendant agreed to purchase 1,108,000 fully paid-up shares of $1 each in a private limited company called Seasian Hotel Sdn Bhd for $845,970.91. It was an express term of the contract that the defendant was to pay the purchase price to the plaintiff on 28 February 1986 whereupon the plaintiff was obliged to deliver to the defendant the relevant share certificates together with the relevant memorandum of transfer duly executed by the plaintiff as vendor.

Just two days after the parties had entered into the said agreement for the sale of the shares the defendant wrote its letter of 3 February 1986 to the plaintiff asking the plaintiff to agree to allowing the defendant to defer paying the purchase price for six months pleading the severe strain on its financial resources by the downturn in the economy that was being experienced by the country. The plaintiff replied immediately in writing saying that they could not agree to the proposed deferment of the payment. The plaintiff followed that letter by a solicitor's letter of demand one day after the payment should have been made giving the defendant a week until noon on 8 March 1986 to pay up failing which legal proceedings were threatened. The payment was not effected and on 22 July 1986 the plaintiff caused the writ herein to issue

seeking, inter alia, specific performance of the agreement.

The defendant having entered a conditional appearance to the writ applied to invoke the arbitration clause in the agreement. Nothing came of this. The application was eventually struck off. In the meantime the plaintiff had taken out its application for summary judgment under O 81 of the Rules of the High Court 1980. The application was partly heard in chambers and then adjourned into open court to enable counsel to submit a full argument. At the request of counsel for both sides I allowed written submissions. After due consideration of the submissions and perusal of the cause papers, the application for summary judgment was allowed. The grounds for so deciding follows.

Encik Murthi of counsel for the defendant took up a number of points.

His first contention was that the plaintiff had sought to supplement its statement of claim by affidavits. He pointed out correctly that defects or omissions in a statement of claim may not be corrected by affidavits. However, in the first place, I failed to see any defects or omissions in the statement of claim. The plaintiff pleaded the written contract and in particular the express term in it in respect of completion and contended that there was failure to complete on the part of the defendant in spite of demands. The statement of claim ends with the assertion that the plaintiff was at all material times ready, willing and able to perform its part of the bargain and seeks the remedies prayed for. In the second place and in any event I failed to see corrections of defects or omissions. No doubt various affidavits were filed by the plaintiff. But they either supported the application for summary judgment or dealt with the points raised by the defendant in support of the contention that the defendant has a defence and that in any event the plaintiff should not be given summary judgment. They do not seek to supplement or amend or correct the statement of claim.

A large portion of the affidavits filed on behalf of the defendant and of Encik Murthi's written submissions was devoted to the claim by the defendant that it was entitled to avoid the agreement on the ground that the defendant had entered into it under 'duress and pressure'. It was contended that a hotel belonging to the defendant was 'held under ransom' by the plaintiff who was managing it and that 'fraudulent acts and defaults of the plaintiff's management were concealed' by the plaintiff.

What emerges clearly from a reading of all the affidavits filed by both sides is that the Seasian Corporation Sdn Bhd was the owner of the hotel Orchard Sun in Penang. The hotel had been managed by Orchard International Hotels (M) Sdn Bhd. The shareholders of Orchard International Hotels (M) Sdn Bhd were the plaintiff, the defendant and one James Harry Hill. There appears to have been differences or disagreements (what they were are not revealed) between the parties that resulted in all the parties agreeing at the end of 1984 for the reversion of the management of the hotel to its owners, Seasian Corporation Sdn Bhd. As a consequence it was further agreed that the plaintiff and Hill would purchase at par the defendant's shares in Orchard International Hotels (M) Sdn Bhd and the defendant would purchase the plaintiff's and Hill's shares in Seasian Corporation Sdn Bhd, the majority shares which were in fact owned by the defendant and its subsidiaries. The sale of the shares that the defendant was to buy from the plaintiff was to be effected in two tranches. In respect of the first an agreement was entered into on 10 December 1984 for the purchase by the defendant of the plaintiff's 892,000 shares. That deal went through apparently by some form of contra transactions being effected by the parties. What is significant is that the transaction was completed without any problem or protest. In respect of the second tranch, the parties entered on 1 February 1986 into an agreement similar to the 1984 agreement for the sale of 6,108,000 shares. It is this agreement that is the subject of the instant action.

Now what exactly were the acts of duress and pressure and who were subjected to them and what were the acts of concealment and deception are not divulged. In any event, in the face of, inter alia, the fact that the alleged duress and pressure and acts of deception and concealment were said to have been applied and practised prior to 10 December 1984 and that the agreement of 10 December 1984 was duly entered into and completed without protest and that the parties entered into the second and similar agreement after a long lapse on 1 February 1986, and that during all this time there was no protest of any sort by the defendant, and in the face of the defendant (instead of screaming fraud and deception, duress and pressure) pleading for time to complete on the ground of their financial embarrassment and in the face of the defendant getting yet another opportunity of directing its mind to protesting when the plaintiff's solicitor's letter of demand (threatening legal proceedings) was received by the defendant and in not protesting, I am constrained to the view that the duress and pressure defence, if such is available, is not made bona fide and is so lacking in merit that it can be said to be frivolous and vexatious.

Another point made by Encik Murthi was that because the parties had not referred the transaction to the Foreign Investment Committee the 'plaintiff has practised fraud on a public authority'. I have failed to understand this contention. In any event it is not in dispute that the two contracts were separated by more than 12

months and that the first, of 1984, was between three parties whereas the second, of 1986, was between the plaintiff and the defendant only. The suggestion that both transactions should be treated as one transaction is devoid of merit and can and is rejected summarily.

The next point made is that s 132C(i) of the Companies Act was not complied with. However, Charlotte Ng, a director of the plaintiff company and one of its four shareholders, has stated otherwise by affidavit. That was an issue taken up by the defendant and effectively dealt with by the plaintiff by affidavit evidence. The suggestion appears to be that such a fact has to be pleaded. Such a suggestion has no merit. It is ridiculous to suggest that every time a company sues on a contract it has in its statement of claim vis-à-vis the contract to plead more than that it had entered into the contract on which the suit is based.

Another point taken up was that the transaction was ultra vires the company. Section 20 of the Companies Act provides that an outsider, other than a debenture holder or the minister, may not raise ultra vires. The defendant is an outsider and not a debenture holder or the minister.

Encik Murthi then sought to contend that for specific performance good consideration is not good enough and that there should be valuable consideration. I do not know of such a rule per se and the rationale for such a rule, if there is such a rule. In any event in the instant case it is not disputed that there was a restructuring of the corporation involved when the parties decided to go their separate ways. Part of the restructuring exercise was apparently completed in 1984. What was left was for the defendant to complete the 1986 sale of the shares. It would be most inequitable and unconscionable to allow the defendant at this stage, having agreed that each of the parties should go its separate way and after allowing the earlier and connected transaction to be duly completed, to seek the aid of equity to avoid its legal obligations.

It was also submitted that a contract for the sale of shares is not a proper subject for specific performance. The authorities show that a seller of shares not freely saleable in the open market is entitled to specific performance (see *Duncuft* v *Albrecht*,[1] *Gan Realty Sdn Bhd* v *Nicholas & Ors*,[2] *Turner* v *Bladin*[3] and *Odessa Tramways Co* v *Mendel*.[4] The clincher of course is that (as has been seen) the defendant and its related or subsidiary companies in fact own the majority of the shares of Seasian which I think makes it a textbook example of a contract for the sale of shares that will be enforced by specific performance.

Order accordingly.

Solicitors: *Mah-Kok & Din*; *Murthi & Partners*.

Reported by *Ng Sheau Jiuan*

Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor

HIGH COURT (PENANG) – CIVIL SUIT NO 22-34-86
MOHAMED DZAIDDIN J
8 FEBRUARY 1988

Civil Procedure – Amendment of pleadings – Application for – Plea of fraud to be added in statement of writ – Delay in application to amend – Tactical manoeuvre – Principles governing amendment of pleadings – Rules of the High Court 1980, O 20 r 5(1)

The plaintiffs commenced an action against the defendants for a declaration that the sale of a piece of land to the first defendant was null and void and that the said land was free from any charge registered in favour of the second defendant. The second defendant filed an application for an order that the plaintiffs' writ be struck out under O 18 r 19 of the Rules of the High Court 1980. But before their application was heard, the plaintiffs filed an application for leave to amend their writ under O 20 r 5(1) of the Rules of the High Court by pleading fraud against the second defendant. The second defendant opposed the plaintiffs' application on the ground, inter alia, that the plaintiffs had taken a long time to file their application and that it was not made bona fide. The second defendant also contended that had his application to strike out the writ been heard earlier, he would have been successful and the plaintiffs could not have made this application.

Held, dismissing the plaintiffs' application:

(1) The rule governing the amendment of pleadings is that the court will allow such amendments as will cause no injustice to the other parties. However, there are two circumstances in which an amendment to add an allegation of fraud would not be permitted: (a) where the facts giving rise to the plea of fraud were known at the time of the original pleading and (b) where the delay in pleading fraud was in connection with some tactical manoeuvre.

(2) In the present case, there has been considerable delay on the part of the plaintiffs to make an application to amend their pleadings. This delay was to avoid the original writ and statement of claim from being struck out. It was thus a tactical manoeuvre.

(3) Looking at the original claim, it was obvious that the facts giving rise to the plea of fraud were known to the plaintiffs or their solicitors much earlier.

Cases referred to

1 *Yamaha Motor Co Ltd* v *Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 (folld)
2 *Lawrance* v *Lord Norreys* (1888) 39 Ch D 213 (refd)
3 *Hajah Rajiah bte Haji Man* v *Tai Cheng Finance Bhd* [1987] 2 CLJ 154 (refd)
4 *Clarapede & Co* v *Commercial Union Association* (1883) 32 WR 262 (folld)
5 *Atkinson* v *Fitzwalter & Ors* [1987] 1 WLR 201 (folld)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 20 r 5(1)

Lim Leng Han for the plaintiffs.
G Krishnan for the first defendant.
Gerard Chan Weng Yew for the second defendant.

Cur Adv Vult